R.D. # 0002-02
Bloomfield, N.J.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

RENEX DIALYSIS CLINIC OF BLOOMFIELD, INC.[1]	
Employer	
And	**CASE NO. 22-RC-12162**
DISTRICT 1199-J, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, AFSCME, AFL-CIO	
Petitioner	

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding[2], the undersigned finds:

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[1] The name of the Employer appears as amended at the hearing.

[2] Briefs filed by the parties have been duly considered.

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[3]
3. The labor organization involved claims to represent certain employees of the Employer.[4]
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.
5. The appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act is described infra.

I. The Petition

The Petitioner, in its petition as amended at hearing, seeks to represent a unit of 37 employees including all full-time and regular part-time registered nurses (RNs), patient care technicians (PCTs), ward clerks and equipment technicians employed by the Employer at its Bloomfield, New Jersey facility (the facility), excluding administrative assistants, managerial employees, social workers, dieticians, guards

[3] The Employer is a New Jersey Corporation engaged in the provision of hemodialysis for patients with End Stage Renal Disease at its Bloomfield, New Jersey facility, the only facility involved herein. During the preceding 12 months, the Employer derived in the course and conduct of its provision of hemodialysis services gross revenue in excess of $250,000. During the same period of time, the Employer has purchased and received goods and materials valued in excess of $5,000 directly from suppliers located outside the State of New Jersey.

[4] The parties stipulated and, I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

and supervisors as defined in the Act and all other employees. The Employer argues that the petitioned-for unit is inappropriate because the RNs are statutory supervisors as set forth in Section 2(11) of the Act, the ward clerks are office clericals and confidential employees and the petitioned-for classifications do not share a community of interest. The Employer contends that the only appropriate unit is a unit composed solely of full-time and regular part-time PCTs. Further, although the Employer does not oppose the inclusion of regular part-time employees in the unit, it contends that the determination whether per diem employees are "regular" and eligible to vote should be made pursuant to the Board's standard as set forth in *Marquette General Hospital, Inc.,* 218 NLRB 713 (1975). The Petitioner asserts that this standard is not appropriate.

II. Background

The Employer is engaged at its Bloomfield facility in the provision of hemodialysis to patients with End Stage Renal Disease (ESRN). Hemodialysis is the process of extracting liquid and toxins from patients because their kidneys have ceased to perform that function. Hemodialysis is accomplished by pumping blood out of a patient's body and through a dialysis machine that cleanses it. Most patients with ESRD receive dialysis three times each week. At the time of hearing, the Employer was treating 154 patients.

In New Jersey, dialysis centers that provide care to patients with ESRD are regulated by federal and state law. These regulations govern aspects of the industry such as the management structure, minimum staffing requirements and duties that can be performed by licensed and unlicensed personnel. In support of its position that

RNs are statutory supervisors, the Employer relies particularly on regulations promulgated by the New Jersey Board of Nurses which impose upon RNs the responsibility for patient care and supervision of ancillary personnel, such as PCTs.

The Employer employs at the facility Clinic Manager Plinary Arenas and two Charge Nurses (CNs), Lois LaManna and Gemma Pamplona. The Employer's Area Manager, Terry Sullivan, also has an office at the facility. The parties agree that Arenas, Sullivan and the CNs are statutory supervisors and should be excluded from the unit.

Arenas is a registered nurse and the chief operating officer responsible for the entire facility. His office is located on the downstairs floor of the facility; he rarely supervises patient care directly. The CNs work on the upper floor of the facility and primarily manage patient care. According to Arenas' testimony at the hearing, CNs also have authority over non-patient care departments and act as the highest authority in charge of the facility in his absence. In addition to the managers who work full-time at the facility, the Employer retains a Medical Director, Neil Lyman, MD, who is in charge of medical treatment at the facility and chairs its governing body.[5] The Medical Director works at the facility two to four hours each Wednesday.

The facility's operation is divided into the following departments comprised of the employee classifications listed in parenthesis: Direct Patient Care (RNs and PCTs); Data Entry (ward clerks); Technical (equipment technician); Social Work

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[5] Under federal law, each ESRD dialysis facility operates under the control of an identifiable governing body. The governing body adopts and enforces rules and regulations relative to the healthcare, safety and protection of patients and is responsible for the overall operation of the facility. The governing body appoints a qualified chief

(social worker) and Dietary (dietitian). Elizabeth Hernandez is Arenas' administrative assistant and is in charge of the Data Entry department.[6]

III. The Direct Care Department and the Supervisory Status of RNs

The petitioned-for classifications include approximately 12 RNs, 22 PCTS, 1 equipment technician and 2 ward clerks employed by the Employer at the facility. Among the RNs and PCTs, the Employer employs 8 full-time RNs, 1 regular part-time RN, 3 per diem RNs, 11 full-time PCTs, 1 regular part-time PCT and 10 per diem PCTs. An additional 4 RNs are contracted to work at the facility, but are not employed by the Employer.[7] Full-time RNs and PCTs work four 10-hour days each week. The regular part-time RN and PCT work 30-hour weeks. Per diem RNs and PCTs are required to work a minimum of one Saturday each month and are otherwise called in to work as needed and as their availability allows.

The principal duty of staff RNs and PCTs is to provide dialysis treatment for individual patients assigned to them. During the course of direct treatment, described more fully below, RNs and PCTs attach the patient to a dialysis machine, initiate treatment and monitor both the patient's condition and the machine's operation. PCTs

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executive officer, in this case Arenas, who is responsible for enforcing rules and regulations, managing and administering the facility.

[6] The record was not developed as to the supervisory status of Hernandez, but the parties agree she should be excluded from the unit.

[7] The Petitioner does not seek to represent these four agency RNs; the parties agreed to exclude them from the unit.

administer treatment in much the same manner as RNs, except they cannot draw medication[8] and do not "assess" the condition of patients. Each patient must be assessed by an RN at the start of every treatment and again if the patient suffers a complication during treatment. Arenas testified that RNs' assessments are based on their extensive schooling, training and experience in evaluating patients' signs and symptoms.[9] Although PCTs do not perform assessments, they report information to the RNs who, in turn, use that information to determine the patient's condition. PCT Anthony Price testified that RN assessments of his patients take only a few minutes.[10]

Per diem RNs and PCTs perform the same responsibilities as their full-time and regular part-time counterparts, but they do not have primary patient care assignments. RNs and PCTs are responsible for tracking the progress of patients on a monthly basis by preparing progress notes, reviewing patient medications and conducting patient education.

Dialysis treatments are performed according to written protocols that are prescribed by the patient's physician and noted on each patient's hemodialysis

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[8] Almost every dialysis patient receives heparin, a medication that prevents blood clotting, in an amount prescribed by a physician. At the beginning of each shift, the RNs designated as "team leaders" draw heparin into syringes for scheduled patients and label the syringes by patient name. PCTs may not draw heparin, but can administer it. PCTs may also administer saline to patients. All other medications must be administered by RNs.

[9] Arenas testified that assessment is a process commonly abbreviated as IPPA – inspection, percussion, palpation and auscultation.

[10] Price also testified that only RNs, not PCTs, are involved in the preparation of "patient care plans." Although Price had never seen a patient care plan before, he was familiar with the term and believed it was a care plan that outlines such things as the patient's diet and medication. Price did not testify whether such plans are used at the facility or what role RNs play in connection with them. Because the record is not developed in this regard, I do not consider it in my determination of the issues presented herein.

flowsheet.[11] Protocols are standing orders from a physician, which prescribe a certain course of treatment to be administered to a patient on a regular basis or upon the occurrence of certain events. Standard protocols for dialysis treatment include designation of the duration of treatment, amount of heparin to be administered, the maximum pump speed, the dialysis temperature and the type of dialyzer to be used.[12] A physician may also prescribe a course of treatment or medication to administer in the event of certain contingencies. For example, Arenas testified that a physician may outline a plan of anemia management that requires a patient to receive a prescribed medication when his or her hemoglobin falls or increases beyond certain levels. RNs are required to follow all protocols and may not deviate from a protocol without the prescribing physician's permission. If a patient's standing protocols do not include a certain medication an RN believes is needed, the RN must obtain a prescription for that medication from the treating physician. RN Maria Lina Maniacop testified that RNs will normally notify PCTs of any protocol changes a physician has ordered for patients the PCTs are treating.

The Employer operates six days a week from 5:00 a.m. to 11:30 p.m. RNs and PCTs work the day shift from 5:00 a.m. to 3:30 p.m. or the evening shift from 1:00 p.m. to 11:30 p.m. Evening shift employees receive a shift pay differential. Arenas

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[11] A hemodialysis flowsheet is prepared each time a patient undergoes treatment. The flow sheet reflects the details of each treatment such as medication administered, the patient's vital signs, adverse events that occurred and certain dialysis machine operations. Each flow sheet must be reviewed and validated by a CN, a Relief Charge Nurse who substitutes for CNs, discussed infra, or a team leader.

[12] Arenas testified that the dialyzer is the artificial kidney used to filter a patient's blood.

schedules the days, hours and shifts that employees work. All employees swipe a card through a time clock to punch in and out for the day and note their hours on a sign in/out sheet kept near the time clock. Employees do not swipe in or out for a paid half hour lunch. One CN works each day from 7:00 a.m. to 7:00 p.m. One day shift RN is designated as the Relief Charge Nurse (RCN) to replace the CN from 5:00 a.m. to 7:00 a.m. and one evening shift RN is designated RCN from 7:00 a.m. to 11:30 p.m. An RCN is also designated when both CNs are absent from the facility.

RCN designations are generally made among RNs on a rotating basis. Maniacop testified that four RNs currently rotate as the RCN on the evening shift.[13] RNs are paid a wage differential of $1 per hour for time they work as RCNs. According to Arenas, RCNs are in charge of the entire facility when he, Sullivan and the CNs are not present. Additionally, two RNs are designated team leader each shift. Arenas testified that each team leader is responsible for one side or half the patients (one to 10) being treated at the facility at any given time.[14] Team leaders receive no pay differential.

The Employer has 20 dialysis stations on the upper or patient care floor of the facility where it can treat 20 patients at a time. Each station has a dialysis machine and a chair for the patient to sit. Patients are assigned to an attending RN or PCT who

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[13] The evidence does not clearly establish whether some or all of the RNs on the day shift rotate as RCN. Day shift RN Maria Albano, a witness for the Petitioner, testified that she acts as RCN once or twice each month.

[14] Of the two or three staff nurses assigned each shift, two are designated team leaders. If the CN is not present, the third RN may be designated RCN or an RN may be designated both as team leader and RCN at the same time.

administers treatment. The facility treats four shifts of patients per day from about 5:30 a.m. to 10:00 a.m., 9:30 a.m. to 2:45 p.m., 2:45 p.m. to 6:00 p.m. and 6:00 p.m. to 11:00 p.m. On average, the facility administers 70 treatments each day. In addition to the dialysis stations, the facility has a Soiled Holding room where used materials and body fluids are disposed. Maniacop testified that she has directed PCTs to dispose of materials such as sharps, containers and other garbage that the PCT used.

Generally, dialysis treatments are scheduled in advance and listed on a daily schedule prepared towards the end of the preceding day by the CN. The daily schedule of patient assignments is prepared by a RCN only if both CNs are absent. RN Maria Albano testified that when she has completed the daily schedule, she assigned RNs and PCTs to patients on a strictly arbitrary basis because they have similar skills.

Arenas testified that, if necessary during the day, all RNs are authorized to change the patient assignments of PCTs and RCNs and team leaders may change RN patient assignments. Arenas testified that such changes to the daily schedule are normally made by the RCN if no CN is present. As an example, Arenas testified that a patient assigned to an RN may be given to a PCT whose patient has cancelled a treatment. According to Arenas, this is done so the RN can perform additional work that only he or she can do (for example, assessing patients). Finally, Albano testified that, as RCN, she has honored caregivers' requests to change their patient assignments when she has deemed the requesting caregiver's explanation adequate. In these situations, Albano has granted such employee requests when the caregiver has had a bad relationship with the patient he or she was initially assigned, but has denied

requests to be reassigned because the caregiver believes the treatment of a certain patient will be long or difficult. Although the record indicates that the patient assignment changes described above occur, the record is vague as to their frequency.

The Employer introduced into evidence a staffing model that sets forth a staffing goal of five PCTs and one staff RN per shift, each of whom is assigned three patients per patient shift. The model also indicates that team leaders are assigned only one patient per patient shift. Arenas testified that, in practice, shifts sometimes consist of six PCTs and no staff RN. Arenas also testified that, depending on staffing levels and patient cancellations, team leader assignments fluctuate from none to two patients and RCNs are rarely assigned any patients.[15] In all circumstances, New Jersey law requires that one RN be present for every nine patients and prohibits PCTs from treating more than three patients at once.

The Employer contends that RNs, particularly while acting as RCNs and team leaders, are statutory supervisors by virtue of their involvement in scheduling employees. Arenas testified that RNs have, without prior approval by management, called for staff coverage when an employee is unexpectedly absent, even if the covering employee will be working overtime. Arenas also testified that RCNs have allowed employees to go home early without prior approval by management. However, Arenas did not establish how often RCNs perform those functions and the two RNs called as witnesses by the Petitioner testified that they have never called for coverage, granted overtime or allowed employees to go home without getting prior

[15] Although the facility can treat 20 patients, patient shifts often consist of only 17 or 18 patients due to cancellations.

approval by management. The Employer also relies on evidence that patient care employees fill out an overtime form, which indicates the time and reason for extra work they perform, and must have it signed by a CN or RCN. Arenas testified that team leaders are also responsible for assigning staff RNs and PCTs to breaks.

The dialysis procedure begins each day with the first shift preparing equipment and medication for the scheduled patients. Since only RNs can administer medication, the team leaders draw heparin doses for each patient pursuant to physicians' orders.[16] On each shift, one RN or PCT is assigned to mix bicarbonate solution by the CN or RCN who makes out the daily schedule. Bicarbonate solution is part of the dialysate solution that is used to clean patients' blood.

When patients arrive, they notify whomever they see of their presence; they are then advised as to which RN or PCT they are assigned. Regular patients normally know to weigh themselves and report that weight to their attending caregiver, who in turn calculates the "goal" or amount of fluid weight that must be extracted from the patient.[17] Arenas testified that, if a PCT determines that a lot of weight must be extracted from the patient (8 to 10 kg), the PCT must obtain permission to do so from an RN. The attending RN or PCT then leads the patient to a dialysis station, attaches the patient to a dialysis machine and initiates treatment. The attending RN or PCT monitors the patient and takes his or her vital signs every 30 minutes. The attending

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[16] Arenas testified that other medications that RNs commonly administer to patients include Epogin, Vitamin D analogs and iron preparations.

[17] The calculation appears simple: the RN or PCT subtracts the patient's correct or "dry weight," which is determined by his or her physician, from the patient's weight before treatment.

RN or PCT also monitors the dialysis machine to ensure that it is operating within the Employer's parameters.

The dialysis machine has certain displays, alarms and controls, which allow the operator to see how the machine is functioning and whether something is wrong with the machine and to make adjustments as needed. For example, the machine displays and allows for adjustment of treatment time, the goal, pump and heparin rates and various pressure readings. Saline can also be administered to a patient by pushing a button on the machine. The machine sounds certain audible and visual alarms if it is not functioning properly. Albano testified that she has directed PCTs to check alarms that are sounding on machines the PCTs are assigned. The record indicates that PCTs may make certain adjustments without consulting an RN and both RNs and PCTs may make certain adjustments without consulting the patient's physician. For example, an RN or PCT may administer saline and/or reduce the goal of a patient whose blood pressure is low or who is experiencing cramping. However, RNs and PCTs may not deviate from a course of health care prescribed by a standing protocol or administer new medication without the physician's consent. If a PCT makes an adjustment without notifying an RN, he or she must record it on the patient's hemodialsyis flowsheet and report it to an RN after the fact.

RNs employed by the Employer must have a four-year college degree in nursing; PCTs need a high school education. Arenas testified that every new RN and PCT undergoes an orientation program. Although the Employer tries to hire new employees with prior experience in dialysis who do not need training beyond the initial orientation, it will train new employees without such experience if necessary.

The training program consists of one month of classroom instruction by an employee not based in the Bloomfield facility as well as clinical instruction by RNs and PCTs designated as "preceptors." Management solicits oral reports from the preceptors regarding the progress of new employees in order to determine when the employees are sufficiently trained to join the regular staff. RNs and PCTs without dialysis experience receive the same training course; a PCT preceptor can train a new RN and vice-versa.

In addition to initial orientation and training, the Employer administers, as part of its disciplinary procedure, "reorientation" and "close supervision." According to Arenas, employees receive reorientation when they have serious performance deficiencies that may result in discharge, while close supervision involves less severe performance problems that need to be corrected. Arenas testified that no single member of the staff is assigned to reorient or closely supervise a problem employee. Rather, management solicits information from all employees working with the RN or PCT to determine whether the subject caregiver is performing up to the Employer's standards. The record contains no evidence that employees recommend a personnel action such as discipline or discharge in providing such reports to management.

The Employer also conducts annual evaluations for every employee. RN and PCT evaluations are initially prepared by the CNs and approved by Arenas. Although the evidence indicates that Arenas and the CNs sometimes solicit oral reports from RNs and PCTs regarding employees' performance, management always investigates negative reports it receives from the staff before including that information in an evaluation. Further, no evidence suggests that such employee reports have included

recommendations regarding what evaluation or wage increase the subject employee should receive.

RNs are paid between $20 and $30 per hour while PCTs earn between $10 and $20 per hour. The evidence indicates that CNs are paid a salary while the RNs and PCTs receive an hourly wage. The CNs' salaries were not disclosed at hearing, but the evidence indicates that CNs earn, if broken down to an hourly wage, at least 10% more than the highest paid RN, without considering overtime or differentials. Management and all full-time employees receive the same benefits, which include paid time off, medical coverage, parking and a 401(k) plan. Regular part-time employees receive much the same benefits, but only receive 75% of the paid leave that full-time employees receive. Per diems do not receive benefits other than parking.

The Employer contends that RNs are statutory supervisors of the PCTs because an RN may direct a PCT to perform certain tasks in the course of healthcare. To support that position, the Employer introduced evidence of complications that may arise during the course of dialysis, patient symptoms which RNs must use to identify those complications and directions RNs may issue to PCTs in order to assess and treat them. In this regard, Arenas testified that a RN may direct a PCT to press the sodium button, lower a patient's goal or reposition a patient suffering from "hypotension" or low blood pressure. Arenas also testified that an RN may direct a PCT to reduce the goal of a patient who is experiencing muscle cramps. According to Arenas, patients experience hypotension and cramps on a daily basis. Arenas also described other tasks RNs can direct PCTs to perform, pursuant to established protocols in treating

various complications, such as taking a patient's temperature, drawing blood, checking vital signs, administering oxygen, changing the dialysate solution, disposing of materials such as the dialyzer and tubes, stopping treatment and restarting the patient on a new system. The Employer emphasized that many dialysis complications are dangerous and may require an emergency response.[18]

Although Arenas testified at length regarding complications such as angina, anaphylaxis, fever and chills, hyperkalemia and elevated blood pressure that have occurred at the facility, the record is vague regarding the frequency of those complications and/or how often RNs direct PCTs in the course of treating them. The record also fails to establish how often RNs direct PCTs to perform tasks in treating common complications, such as hypotension and cramps. Indeed, as referenced above, Arenas agreed that PCTs may, without consulting an RN, reduce the goal of a patient who is cramping. PCT Price testified that he has, without consulting an RN, lowered the goal and administered saline to patients with hypotension.[19] Arenas and Price both testified that PCTs need only report such adjustments to an RN after the fact. According to Price, saline helps patients with hypotesion "99% of the time" and he only contacts an RN to assist him in the rare event that it does not work.

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[18] CN LaManna testified that, during the 2 ½ year period that she has been employed at the facility, 911 has been called about 25 to 30 times. RN Maniacop and PCT Price testified that RNs do not direct PCTs when responding to an emergency situation because PCTs know what to do.

[19] Evidence that PCTs treat hypotension and cramps on their own is inconsistent with Arenas' testimony that PCTs are not supposed to assess such conditions. Although PCTs are not supposed to assess patients, the uncontradicted evidence indicates, and I find, that they identify and treat without instruction those conditions that patients regularly experience (i.e., cramps and hypotension) while being treated.

The record is also vague regarding the context in which RN directions are issued. The evidence appears to indicate that RNs primarily, in assessing a patient assigned to a PCT, direct an attending PCT to supplement his or her treatment by performing certain tasks. The evidence does not clearly indicate whether RNs regularly direct PCTs to assist in the treatment of patients assigned to the directing RN or another caregiver.

Analysis

Section 2(11) of the Act defines the term "supervisor" as:

> …any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgement.

It is well established that an individual need possess only one of the enumerated indicia of authority in order to be encompassed by the definition, as long as the exercise of such authority is carried out in the interest of the employer, and requires the exercise of independent judgment. *Big Rivers Electric Corp.,* 266 NLRB 380, 382 (1993). The legislative history of Section 2(11) indicates that Congress intended to distinguish between employees who may give minor orders and oversee the work of others, but who are not necessarily perceived as part of management, from those supervisors truly vested with genuine management prerogatives. *George C. Foss Co.,* 270 NLRB 232, 234 (1984). The Board takes care not to construe supervisory status too broadly because the employee who is deemed a supervisor

loses the protection of the Act**.** *St. Francis Medical Center-West*, 323 NLRB 1046 (1997).

The exercise of some supervisory authority in a merely routine, clerical, perfunctory or sporadic manner does not require a finding that an employee is a supervisor within the meaning of the Act. *Somerset Welding & Steel,* 291 NLRB 913 (1988). Designation of an individual as a supervisor by title in a job description or other documents is insufficient to confer supervisory status. *Western Union Telegraph Company*, 242 NLRB 825, 826 (1979). The mere issuance of a directive or a job description setting forth supervisory authority is also not determinative of supervisory status. *Bakersfield Californian*, 316 NLRB 1211 (1995); *Connecticut Light & Power Co.,* 121 NLRB 768, 770 (1958). State legislation requiring a healthcare employee to supervise another is not the equivalent of the Act's requirements for supervisory status. *Third Coast Emergency Physicians*, 330 NLRB No. 117, slip op. at p.1, n.1 (2000); *Crittenton Hospital*, 328 NLRB 879 (1999). Rather, the question is whether there is evidence that the individual actually possesses any of the powers enumerated in Section 2(11). *Western Union Telegraph Company,* above*,* at 826*; North Miami Convalescent Home,* 224 NLRB 1271, 1272 (1976).

In *Kentucky River,* 121 S. Ct. at 1866, the Supreme Court agreed with the Board that the burden of proving supervisory status rests on the party asserting that status. Absent detailed, specific evidence of independent judgment, mere inferences or conclusionary statements without supporting evidence are insufficient to establish supervisory status. *Quadrex Environmental Co.,* 308 NLRB 101 (1992); *Sears Roebuck & Co.,* 304 NLRB 193 (1991). Whenever evidence is in conflict or

otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established. *Phelps Medical Center*, 295 NLRB 486, 490-91 (1989).

The Board has recognized the tension between the "professional judgment" that is required of a professional employee covered by the Act pursuant to Section 2(12) and the "independent judgment" that excludes an employee from coverage by virtue of Section 2(11). Prior to *Kentucky River,* the Board endeavored to resolve this tension in cases involving the supervisory status of professional employees by ruling that the use of professional judgment to direct employees was not "independent judgment." However, in *Kentucky River*, the Supreme Court ruled that the Board may not exclude from the "independent judgment" required in Section 2(11) professional or technical judgment when used in directing less-skilled employees to deliver services. The Court reasoned that such a per se approach was inconsistent with the language of Section 2(11) and its previous decision in *NLRB v. Health Care and Retirement Corp,* 511 U.S. 571 (1994), in which it had ruled that the statute applies no differently to professionals than to other employees.

Although the *Kentucky River* Court found the Board's interpretation of "independent judgment" to be inconsistent with the Act, the Court recognized that it is within the Board's discretion to determine what scope or degree of discretion meets the statutory requirement that a supervisor use independent judgment. Id. at 1867. The Court stated: "Many nominally supervisory functions may be performed without the 'exercis[e of] such a degree of … judgment or discretion … as would warrant a finding' of supervisory status under the Act." Id. (citing *Weyerhaeuser Timber Co.,*

85 NLRB 1170, 1173 (1949)). The Court also agreed with the Board that if the Employer limits the degree of independent judgment by, for example, detailed orders, the individual may not be appropriately held a supervisor. *Kentucky River*, above at 1867 (citing *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995)). Additionally, while the Court explicitly refrained from interpreting the phrase "responsibly to direct," the Court suggested that the Board could interpret this phrase by "distinguishing between employees who direct the manner of others' performance of discrete tasks from employees who direct other employees as [Section] 2(11) requires." *Kentucky River*, above at 1871 (citing *Providence Hospital*, 320 NLRB 717, 729 (1996)).

In the instant case, PCTs do almost all of their work independently in performing the Employer's primary service - dialysis treatment. The Employer's argument that RNs use independent judgment to responsibly direct PCTs depends upon the application of the statutory criteria to the minimal portion of PCTs job duties performed when PCTs work in proximity to RNs. Thus, the Employer's argument focuses mainly on directions given by RNs to PCTs during the RNs' assessment of patients, a function that Price testified takes no more than a few minutes. In such situations, RNs may instruct PCTs to perform functions they regularly do on their own such as taking a patient's temperature, checking vital signs, administering saline and making adjustments to the dialysis machine.

The Board has recognized the type of instruction generally at issue in this case is both an assignment and a direction:

> The term "assignment" … clearly differs from responsible direction in that it refers to the assignment of an employee's hours or shift, the assignment of an employee to a department or other division, or other overall job

> responsibilities. It would also include calling in an employee or reassigning the employee to a different unit. Whether assignment also includes ordering an employee to perform a specific task is, however, less clear. … Certainly there are times when the assignment of tasks overlaps with direction. For example, ordering a nurse to take a patient's blood pressure could be viewed as either assigning the nurse to that procedure or directing the nurse in the performance of patient care. Because the distinction between assignment and direction in these circumstances is unclear, the Board has often analyzed the two statutory indicia together.

Providence Hospital, above at 727. Regardless of whether the instruction is an assignment or a direction, the Board decides if the instruction is given with supervisory authority by determining if the instruction requires independent judgment. Id. at 729; *Ten Broeck Commons*, 320 NLRB 806, 810 (1996).

The Employer argues that because RNs issue instructions to PCTs in the course of dialysis care, RNs responsibly direct PCTs. However, not all assignments and directions given by an employee involve the exercise of supervisory authority. In *Providence Hospital*, above at 733, 734 and 736, the Board found that charge nurses and other health care employees with the responsibility to direct employees were not statutory supervisors because their assignments and directions were not made with Section 2(11) authority. There, the Board quoted the court in *NLRB v. Security Guard Service*, 384 F.2d 143, 151 (5th Cir. 1967):

> If any authority over someone else, no matter how insignificant or infrequent, made an employee a supervisor, our industrial composite would be predominantly supervisory. Every order-giver is not a supervisor. Even the traffic director tells the president of a company where to park his car.

Providence Hospital, above at 725. The Board has instructed that each case involving the indicia of assignment and responsibility to direct turns on its own particular facts and that there are no hard and fast rules. Id. Since Section 2(11) explicitly requires a

statutory supervisor to use independent judgment in assigning and responsibly directing employees, determining whether an employee's directions render the employee a statutory supervisor requires deciding whether the directions given require independent judgment or whether such directions are merely routine. Id. at 729.

There can be no doubt that the tasks which PCTs are assigned are of critical importance to the health of the patients who visit the facility. This does not mean that the directing of such tasks cannot be routine. As the Board observed concerning a treatment plan devised by a charge nurse for a patient in *Ten Broeck Commons*, above at 811:

> There is an important distinction between designing complex work tasks and directing employees in carrying out those tasks. If this distinction is blurred, it becomes easy to be misled into concluding that an individual exercises independent judgment based simply on the fact that the work tasks being designed by that individual are relatively 'complex' or 'important.' …
> [T]he fact that severe adverse consequences might flow from an employee's routine direction or monitoring of the work of others does not, without more, make the employee a supervisor.

The work of the PCTS at issue here consists of following protocols and procedures for setting dialysis machine operations, such as the goal, blood flow, dialysate flow and duration of treatment, monitoring and adjusting such operations and checking patients' vital signs and temperature. PCTs also push a button on the machine to administer saline if necessary, mix bicarbonate solution and dispose of medical waste. The discrete tasks performed by the PCTs are similar to those previously found to be routine by the Board. In *Loyalhanna Health Care Associates*, 332 NLRB No. 86, slip op. at p. 3 (2000), the Board found that nurses did not use supervisory authority to give directions to aides in the absence of evidence that such

direction involved other than routine aspects of patient care, such as taking patients' vital signs and ensuring that care plans are followed. See also *Northern Montana Health Care Center,* 324 NLRB 752, 753 (1997); *Ten Broeck Commons*, above at 810-812. RNs' directions to PCTs to follow established protocols and standard procedures are routine instructions that do not require the use of Section 2(11) independent judgment. *Kentucky River*, 121 S. Ct. at 1867; *Loyalhanna Health Care Associates*, above at p.3*; Ten Broeck Commons,* above at 810-812; *Northern Montana Health Care Center*, above at 753; *Weyerhaeuser Timber Co.,* 85 NLRB at 1173.

The assignment of tasks in accordance with an Employer's set practice, pattern, parameters or protocol does not require exercise of independent judgment to satisfy the statutory definition. *Kentucky River*, above at 1867; *Chevron Shipping Co*., above at 381; *Express Messenger Systems*, 301 NLRB 651, 654 (1991); *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1075 (1985). Where an employee has been preassigned a set of tasks, it is not supervisory authority for an employee to ask another employee to do those tasks that were already assigned to him or her. *Western Union*, above. Here, the Employer has decided that PCTs can provide dialysis care and has made certain that the PCTs are trained to do tasks necessary for the performance of that function. Thus, the evidence indicates that PCTs are trained to perform such tasks as adjusting dialysis machine settings, taking vital signs and administering saline to patients and do so on their own without instruction. In these circumstances, the decision of an RN to direct a PCT to do such tasks, which the Employer has determined can be done by the PCT, does not reflect supervisory

authority under the Act.[20] *Kentucky River*, above at 1867; *Chevron Shipping Co.,* above at 381; *Express Messenger Systems*, above at 654; *Bay Area-Los Angeles Express*, above at 1075. Therefore, I find that RNs do not use independent judgment to responsibly direct PCTs in this regard.

An assignment based on an assessment of employees' skills, where the matching of skills to requirements is a routine function, does not reflect supervisory authority under the Act. *Ten Broeck Commons*, above at 810 (charge nurses' assignment of work to certified nursing assistants did not require the use of independent judgment because the assistants had the same skills and were routinely rotated). Here, there was no evidence that RNs take into account any factor such as the PCTs' skill or experience in determining the tasks or assignments to be performed by PCTs. The absence of consideration by RNs of such factors further indicates that their decision to delegate a task during dialysis care is not made with independent judgment. *Kentucky River,* above at 1867; *Ten Broeck Commons*, above at 810; *Weyerhaeuser Timber Co.,* above at 1173.

Similarly, the absence of significant discretion in deciding which employee an RN will direct also undermines a finding that an employee exercises independent supervisory judgment. In *Weyerhaeuser Timber Co.,* above at 1173, the Board, in finding that assignments by an employee to one of two machinists were routine, noted that an employee does not exercise any significant degree of discretion when making

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[20] Tellingly, RNs do not have discretion to assign PCTs responsibilities, such as assessing patients and administering medication, that the Employer has *not* determined PCTs may perform.

an assignment if there is a limited number of persons available and qualified to perform the work. Here, the record fails to establish that RNs have unfettered discretion to direct any PCT to perform tasks in connection with the care of any patient. Rather, RN direction appears to occur primarily in the context of an RN who, after having assessed a patient assigned to a PCT, instructs the one PCT who is so assigned to perform the tasks or adjustments the RN deems necessary. The absence of such discretion further indicates that RNs exercise limited independent judgement in directing PCTs.

Additionally, I find that the distinction approved by Justice Scalia in *Kentucky River* between directing discrete tasks and directing employees applies to the facts here. Thus, by virtue of their professional training in the assessment of patients, RNs direct PCTs to perform discrete tasks that effectively fill gaps in treatment being administered by PCTs. In this context, the RN and PCT function as members of a team whereby the RN determines a course of healthcare and the PCT executes discrete tasks necessary to implement the RN's decision. In such circumstances, I find that RNs are directing discrete tasks and thus are not acting as statutory supervisors of PCTs. *Kentucky River,* above; *Providence Hospital*, above.

In reaching the conclusions I have outlined above, I am mindful that Arenas testified repeatedly that RNs, in assessing patients and determining courses of treatment, rely on their extensive professional training and experience to make important judgments that can affect the well-being of patients. However, the Employer, in eliciting such testimony, focuses upon the patient care decisions made by RNs. The question is not whether RNs have discretion and utilize independent

judgment to determine what complications a patient may be experiencing or how to treat such complications even in dire medical situations. The question is whether RNs exercise discretion and independent judgment in responsibly directing employees. Here, once an RN makes a complex and important assessment regarding the care of a patient, he or she thereafter has little discretion and utilizes minimal judgment regarding the PCT to assign, what tasks PCTs may perform or how they shall perform them. Rather, the evidence indicates that RNs primarily direct the one attending PCT to perform discrete tasks he or she has been trained to do and has experience performing, without instruction.

In *NLRB v. Quinnipiac*, 256 F.3d 68 (2d Cir. 2001), a finding of responsible direction resulted from the fact that supervisors were accountable for the performance of other employees. In *Custom Bronze & Aluminum Corp.,* 197 NLRB 397, 398 (1972), the Board relied "in particular" on the fact that the alleged supervisor alone was responsible for the work of other employees. In *Schnurmacher Nursing Home v. N.L.R.B.*, 214 F.3d 260, 66-67 (2nd Cir. 2000), the court relied heavily on the fact that a putative supervisor was held accountable for the employees she supervised to the extent that the supervisor was disciplined for the shortcomings of the supervisees. Here, the Employer argues that RNs, as a matter of law, maintain ultimate responsibility for patients treated at the facility and are statutory supervisors on that basis. I find, contrary to the claim of the Employer, that Board law does not equate such a regulatory requirement with statutory supervision as defined in the Act. *Crittenton Hospital*, 328 NLRB at 879; *Third Coast Emergency Physicians*, 330 NLRB No. 117, slip op. at p.1, n.1. Moreover, the Employer has offered no evidence

that RNs are held accountable, as a personnel matter in such forms as discipline or a poor evaluation, for mistakes in treatment made by PCTs. The absence of this accountability is consistent with my finding that the RNs do not responsibly direct PCTs. *NLRB v. Quinnipiac*, above; *Schnurmacher Nursing Home*, above; *Custom Bronze & Aluminum Corp*, above.

In sum, I find that RNs' instructions to PCTs involve routine tasks performed during a limited portion of PCTs' duties. Furthermore, while RNs undoubtedly use independent judgement to determine a course of patient care, the Employer has not provided concrete evidence of how the RNs have discretion or use independent judgment to assign tasks to PCTs. I find that RNs assign PCTs only discrete tasks in which they have been trained and that RNs do not differentiate between the skills and experience of PCTs when they assign such tasks. I further find that the record shows that RNs are not held responsible, for purposes of their continued or successful employment with the Employer, for PCTs' work. For all of these reasons, I find that the Employer has not sustained its burden of proving that RNs use independent judgment to assign and responsibly direct PCTs.

The Employer also asserts that RNs exercise supervisory discretion by virtue of their involvement in employee assignments, discipline and evaluations.[21] However, the record failed to establish that RNs play any significant role in

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[21] The Employer contends that RNs reward employees by their involvement in assigning overtime, in disciplinary matters and in resolving 'gripes' between employees. Regarding the latter, Arenas testified that RCNs "get involved in resolving bickering or gripes between employees" without offering any explanation as to the nature and frequency of such occurrences. I find that Arenas' conclusory testimony does not evidence RNs' authority to reward employees or to "resolve grievances," another indicium in Section 2(11) of the Act.

scheduling or assignment of personnel. In that regard, the Employer introduced no evidence that RNs prepare or were consulted in determining the regular days and shifts that RNs and PCTs work. Arenas appears to perform that function exclusively. CNs prepare the daily schedule of patient assignments and RCNs only perform that function when both CNs are absent. The Employer failed to establish the frequency of such occurrences and/or establish that it requires the use of independent judgement. Albano testified that, when she has prepared the daily schedule, she has assigned RNs and PCTs to patients arbitrarily because RNs and PCTs possess similar training and skills in dialysis treatment. Such routine assignments that do not require the use of independent judgment do not confer supervisory status. *Ten Broeck Commons*, 327 NLRB 806, 810.

The record also fails to establish that RNs exercise significant supervisory authority in obtaining coverage for employees who are absent, approving overtime and/or granting early-departures. Again, the Employer failed to establish how often RNs perform those functions or use independent judgment in doing so. Both of the RNs who testified denied making such assignments without prior approval by management.[22] Further, the evidence indicates that overtime and early-departures are strictly voluntary and that RNs do not consider employees' particular skills or training in deciding whom to call for coverage or in determining whether an employee may leave. Similarly, although RNs serving as RCNs have signed employees overtime forms, Albano's testimony indicates that she has routinely performed that function as

[22] CN LaManna testified that she has received calls at home from RNs about staffing before 7:00 a.m. LaManna and Arenas both testified that

a mere formality to verify that the employee in question was present. The evidence does not indicate that RNs serving as RCNs have ever refused to approve or sign such a form or that they have questioned the reason provided by the employee for working extra time. The exercise of such limited discretion and judgement in connection with scheduling matters does not confer supervisory status upon the RNs. *Chevron Shipping Co.*, 317 NLRB 379, 381, n.6 (1995)(employees not found supervisors despite assigning and approving overtime).

I find additionally that RNs play no significant role in the discipline and evaluation of employees. Arenas testified that RNs and PCTs may report to management misconduct of co-workers as well as other information that management uses to evaluate employees and assign them to or release them from training, reorientation or close supervision. However, the record contains no evidence that RNs have ever recommend what discipline, evaluation, promotion, wage increase or other personnel action should result from the performance or misconduct they report. Moreover, Arenas testified that he and/or the CNs conduct an investigation of any negative report any staff member offers to management and determine what course of action should be taken.[23] The fact that one employee may point out deficiencies in performance of another employee does not necessarily make that employee a statutory supervisor, especially where, as here, the supervisor then makes his or her own

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RCNs have requested prior approval from them before calling staff to perform overtime in covering for an absent employee.

[23] For example, Albano wrote one unsolicited report of misconduct by PCT Sandra Richardson and delivered that report to Arenas; Arenas investigated the matter independently and decided to issue Richardson a written warning.

investigation of the event and decides what to do. *Crittenton Hospital*, 328 NLRB 879*; Express Messenger Systems,* 301 NLRB at 653-654.[24]

Having found that RNs do not, using independent judgment, responsibly direct, assign, discipline, evaluate or exercise any other primary indicia of supervisory status as defined in Section 2(11) of the Act while acting as RCNs or otherwise, it is unnecessary to consider secondary indicia of such status. Moreover, since I find that RCNs do not actually assume the supervisory authority CNs exercise, the issue of whether RCNs spend a significant, consistent or sporadic portion of their time relieving admitted supervisors need not be addressed. Accordingly, based on the foregoing and the record as a whole, I find that RNs are not supervisory employees within the meaning of the Act and I shall include all full-time and regular part-time RNs in the petitioned-for unit, if they so vote.

IV. Non-Patient Care Departments and Appropriate Unit

As noted above, the Petitioner seeks to include in the unit all full-time and regular part-time RNs and PCTs, the equipment technician and ward clerks. The Employer, contrary to the Petitioner, asserts that RNs, equipment technicians and ward clerks must be excluded from the unit because RNs are statutory supervisors, ward clerks are office clericals and confidential employees and the equipment

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[24] Arenas testified, briefly, that RNs verbally reprimand PCTs and that RCNs have authority to issue more severe discipline up to and including discharge. The record contains no evidence that oral reprimands by RNs to PCTs are noted in the file or used in the course of progressive discipline or for evaluations. Arenas also failed to establish the frequency of such reprimands or the matters they address. Therefore, I find that RNs are not supervisors by virtue of such reprimands. The Employer also admits that RCNs have never actually issued discipline to employees. Supervisory status is not conferred by alleged authority a supervisor does not exercise. *Northwest Steel*, 200 NLRB 108 (1972).

technician does not share a community of interest with other petitioned-for employees.

I have already addressed the supervisory status and unit placement of RNs. I also find, as discussed below, that the equipment technician and ward clerks should be included in the petitioned-for unit.

(1) Equipment Technician

The record reflects that the Employer employs one "equipment" or "biomed" technician, Michael Johnson, who occupies a work space in the lower level of the facility.[25] Johnson is responsible for maintaining and repairing the equipment, ordering supplies and maintaining all other physical aspects of the facility. This includes repairing and replacing equipment such as the dialysis machines, water treatment machines and EKGs used in the course of dialysis. He also fixes such things as televisions and replaces light bulbs. Any member of the patient care staff can notify Johnson of an equipment problem and request his assistance. Johnson does not wear scrubs like RNs and PCTs, but sometimes wears patient care protective gear if necessary.

Arenas testified that Johnson performs most of his work downstairs and only about 10% of his work on the patient care floor. Arenas also testified that Johnson is upstairs a total of two or three hours of each 10-hour shift. The evidence indicates that Johnson often questions members of the staff regarding equipment that is

[25] The administrative offices are also located on the lower floor of the facility. That includes Arenas' office, the social worker's office and the dietitian's office.

malfunctioning in order to determine how to repair it. Although the evidence does not indicate any interchange between technicians and other employees, Albano testified that RNs work with the equipment technician or alone to bypass the water system if it is not working.

Like full-time RNs and PCTs, Johnson works four 10-hour days each week, from 7:00 a.m. to 5:00 p.m. While at the facility, Johnson is also on-call to perform maintenance work at the Employer's facility in Orange, New Jersey. Johnson is paid a $105 on-call rate each week, plus any overtime he receives as a result. The record does not contain Johnson's rate of pay. Johnson receives the same benefits as other full-time employees.

Johnson reports to Arenas and to Area Technical Manager Michael Larson, who is based in Orange. Arenas testified that he evaluates Johnson's performance in connection with personnel matters such as wage increases, with input from Larson. Arenas also testified that CNs have authority over all departments, including Technical, and in his absence CNs are in charge of the entire facility.

Based upon the record as a whole, I find that the equipment technician shares a sufficient community of interest with other petitioned-for employees. The evidence reflects that Johnson has daily and significant contact with RNs and PCTs on the patient care floor and works with them in order to repair equipment. Johnson is normally present at the facility and his hours overlap with both shifts of patient care employees. With the exception of Larson, Johnson reports directly to the same managers and supervisors as RNs and PCTs. Johnson also receives the same benefits as full-time RNs, PCTs and ward clerks and like them is paid on an hourly basis. I am

lso mindful of the fact that the lone equipment technician could not obtain representation as a separate unit on his own.[26]

The Employer contends in its brief that "positions such as Biomedical Technician are most appropriately placed in a skilled maintenance unit." However, the Petitioner has petitioned-for no such unit and the Board does not mandate a separate maintenance unit in the health care industry. In making unit determinations, the Board's task is not to determine the most appropriate unit, but simply to determine an appropriate unit. *P.J. Dick Contracting*, 290 NLRB 150 (1988). In so doing, the Board looks "first to the unit sought by the Petitioner. If it is appropriate, [the] inquiry ends. If, however, it is inappropriate, the Board will scrutinize the Employer's proposals." *Dezcon, Inc.,* 295 NLRB 109, 111 (1989). As discussed herein, I find the unit sought by the Petitioner is appropriate for purposes of collective bargaining.

(2) Ward Clerks

The Petitioner seeks to include full-time ward clerks in the unit; the Employer would exclude them as office clericals and confidential employees. Neither the Petitioner nor the Employer seeks to include per diem ward clerks in the unit and I shall exclude them.

The record reflects that two full-time ward clerks and three per diem ward clerks work in a reception area on the first floor, which is near the main entrance of the facility and separated by a wall from the main patient care area behind it. The patient care area is accessible from the reception area by an open hallway on one side

[26] It is contrary to Board policy to certify a representative for bargaining purposes in a unit consisting of only one employee, as here.

of the facility and a door on the other. The reception area contains file cabinets, a computer, a copy machine and a fax machine. Ward clerks do not wear scrubs or protective gear like the patient care staff.

Ward clerks enter information from patients' flow sheets into a computer database and scan various documents, including the flow sheet and other medical records, into the computer system. Albano testified that ward clerks sometimes ask RNs for clarification of information on patients' flow sheets. The ability to type is a requirement of the ward clerk position. They also copy and file medical records and forward those records to other facilities or physicians that require them.

In addition to handling records related to patients, the ward clerks make copies of personnel and payroll records and transmit them to Arenas and to the Employer's corporate office. Ward clerks keep such personnel and payroll records in the reception area only while they are using them. At all other times, such documents are kept in a locked cabinet in Arenas' office.

The ward clerks' duties also include greeting patients who arrive for treatment, advising them of the RN or PCT to whom they are assigned and telling the caregiver that his or her patient has arrived. Arenas testified that ward clerks also have contact with patients on rare occasions near the holidays when they hand out gifts that the Employer gives to patients. Ward clerks assist Arenas in clearing new patients for possible admission. This consists of completing insurance verification forms, making

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Roman Catholic Orphan Asylum, 229 NLRB 251 (1977); *Teamsters Local 115 (Vila-Barr Co.)*, 157 NLRB 588 (1966).

copies of patients' insurance information and faxing those documents to the Employer's corporate office.

The two full-time ward clerks earn between $10 and $15 per hour and work from 9:00 a.m. to 5:00 p.m. They receive the same benefits as other full time employees.

As discussed above, the Employer contends that ward clerks are confidential employees. In support of that position, it notes that Arenas determines the labor relations policies of the facility in conjunction with its governing body; Area Manager Sullivan addresses certain personnel matters; and ward clerks have access to confidential labor matters by virtue of their association with Arenas and Sullivan. According to Arenas, ward clerk Alexandra DelRio has performed various functions which relate to labor relations policies, such as sending and receiving correspondence to and from the corporate office which concern the facility's human resources policies, personnel action forms and incident reports. Arenas also testified that DelRio handled and made copies of documents used by the Employer in the instant case, which were marked as confidential and sent back and forth between the facility and the Employer's attorney.

Confidential employees are employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies with regard to labor relations or regularly substitute for employees having such duties. Under Board policy, confidential employees are excluded from the bargaining unit. *Ladish Co.,* 178 NLRB 80 (1969); *Chrysler Corp*., 173 NLRB 1056 (1969); *B.F. Goodrich Co.,* 115 NLRB 722, 724 (1956). The Board has refused to construe the

definition of confidential employees broadly so as to "needlessly preclude employees from bargaining collectively together with other employees sharing common interests." *B.F. Goodrich Co*., above. The burden of proving the confidential status of employees rests with the party asserting it. *Crest Mark Packing Co.*, 283 NLRB 999 (1987). Employee access to personnel records does not render that employee confidential. *RCA Communications,* 154 NLRB 34, 37 (1965); *Intermountain Rural Electric Association*, 277 NLRB 1, 4 (1985); *Ladish Co.*, above at 90. A single incident or isolated occasions of confidential duties have also been held insufficient to exclude an employee from the bargaining unit. *Crest Mark Packing Co.,* above at 999; *Intermountain Rural Electric Association*, above at 4 (1985). Rather, an employee will be excluded only when he or she maintains a close and confidential working relationship with persons engaged in labor relations as described above and are thereby privy to decisions and information regarding labor policies before they are made know to those affected by them. *Intermountain Rural Electric Association*, above at 4.

Applying the foregoing principles, I find that the ward clerks are not confidential employees as defined by the Board. Evidence that ward clerks have access to personnel and payroll records does not establish that the clerks are confidential. Moreover, the record does not indicate that ward clerks are privy to governing body meetings where labor policies are discussed and formulated or to management meetings where decisions are made regarding the implementation of labor policies. Although Arenas testified that ward clerks handle documents related to the facility's human resources policies, he did not describe when ward clerks gain

possession of such documents or provide even minimal details regarding the nature of those policies. In addition, I find evidence of DelRio's involvement in the preparation of documents for use in the instant case insufficient to exclude her from the unit. Accordingly, I find that ward clerks are not confidential employees and should not be excluded from the unit on that basis.

Having determined that ward clerks are not confidential employees, I must determine whether they share a community of interest with other petitioned-for employees. Ward clerks work on the same floor as the patient care staff and process documentation that care providers prepare during the course of treatment. Ward clerks also have a certain degree of work related contact with RNs and PCTs when they need to clarify information on documents patient care staff members have prepared. Ward clerks earn an hourly wage similar to those of PCTs and receive the same benefits as other full-time employees in the petitioned-for unit. Ward clerks work similar hours to those of the equipment manager and their hours overlap the two patient care shifts. Therefore, ward clerks are regularly present at the facility and in close proximity to other petitioned-for employees. Ward clerks also work under the same managers as other unit employees. Based on the foregoing, I find that the ward clerks share a sufficient community of interest with other employees the Petitioner seeks to represent and I shall include them in the unit.

V. Per Diem Employees and the Regular Part-Time Calculation

The parties agree that regular part-time employees should be included in the unit; they differ only as to the formula that should define "regularity" and determine those per-diem RNs and PCTs who properly belong in the unit.

In determining the status of on-call employees in the health care industry, the Board has utilized various eligibility formulae as guidelines to distinguish "regular" part-time employees from those whose job history with an employer is sufficiently sporadic that it is most accurately described as "casual." *Sisters of Mercy Health Corp.,* 298 NLRB 483 (1990). In *Marquette General Hospital*, 218 NLRB 713, 714 (1975), the Board devised an equitable formula that was designed to determine eligibility where the facts indicated there was significant disparity in the number of hours worked by that employer's on-call nurses. For instance, in *Marquette*, some on-call nurses worked as many as 540.5 hours per quarter, while others worked as few as 23. Under the *Marquette* formula, employees are only eligible to vote in the election if they work at least 120 hours in either of the quarters immediately preceding the election. Id. at 714. However, where the on-call employees, as a group, all appear to work on a regular basis, the Board usually has found a more liberal standard applicable. *Davison-Paxon Co.,* 185 NLRB 21, 24 (1970); *V.I.P. Movers,* 232 NLRB 14, 15 (1977); *Riverside Community Memorial Hospital*, 250 NLRB 1355, 1356 (1980); *West Virginia Newspaper Publishing Co.,* 265 NLRB 446 (1982). See also *Newton-Wellesley Hospital,* 219 NLRB 699, 703 (1975). In *Sisters of Mercy*, where the on-call nurses worked on a regular basis and there was no evidence of the significant disparity in the hours worked of the on-call nurses as found in *Marquette*,

the Board found the *Davison-Paxon* formula to be more appropriate. As a result, on-calls were found to be eligible if they regularly averaged 4 hours or more per workweek during the quarter prior to the eligibility date. *Sisters of Mercy*, above at 484. The Board has rejected any suggestion that there should be a recurrence of employment factor included in the *Davison-Paxon* formula. *Trump Taj Mahal Casino Resort,* 306 NLRB 294 (1992).

The Employer introduced into evidence two documents which list the hours of each per diem RN and PCT for the third and fourth quarters of 2001. Per diem hours for those quarters are as follows:

Per Diem PCT or RN	3rd	4th	Total
Bernaldez, Gloria - PCT	49.28	117.55	166.83
Delacruz, Oscar - PCT	0	103.3	103.3
Maldonad, Judith - PCT	123.14	297.1	420.24
Ocampo, Macario - PCT	0	0	0
Reyes, Eric - PCT	62.7	17.8	80.5
Richards, Maxine - PCT	0	140.5	140.5
Villacres, Lupe - PCT	18.87	18.93	37.8
Yumang, Marty - PCT	534.83	161.12	695.95
Clavijo, Juan - RN	20.7	0	20.7
Inocencio, Ramon - RN	90.32	66.22	156.54
Whitfield, April - RN	81.1	54.68	135.78

Therefore, as in *Marquette*, above, the per-diem nurses here have exhibited a significant disparity in their work hours. Therefore, I find that it is appropriate to apply that formula in the instant situation.

Of course, the above presumes that per diems have a sufficient community of interest with regular employees to be included in the first place. The Board will look at the ability of an employee to accept or reject employment as a relevant consideration in evaluating the interests of such employees, but that factor is not determinative. *Pat's Blue Ribbons,* 286 NLRB 918 (1987); *Tri-State Transportation Co.,* 289 NLRB 356, 357 (1988). Here, the record disclosed that per-diem RNs and PCTs perform work that is identical to that of the regular RNs and PCTs, under the same supervision. The per diem employees are required to work at least one Saturday each month and most consistently log significant hours. While the per-diem employees do not share the same fringe benefits and have flexibility in the acceptance of shifts, I find that these factors do not detract from the substantial community of interest they share with the other unit employees. Under these circumstances, I find that the per-diem RNs and PCTs possess a strong community of interest with their full-time and regular part-time counterparts. *St. Francis Hospital*, *Inc*., above; *Milwaukee Childrens Hospital Assn*., 255 NLRB 1009 (1981); *Newton-Wellesley Hospital*, above.

UNITS/VOTING GROUPS

The Board is prohibited under Section 9(b)(1) of the Act from including professional employees in a unit with employees who are not professionals, unless a majority of the professionals vote for inclusion in such a unit. *Sonotone Corporation*,

90 NLRB 1236 (1950). I shall therefore direct elections in the following voting groups:

Voting Group A

> **All full-time and regular part-time registered nurses, including per diem nurses who have worked at least 120 hours in the relevant quarter, employed by the Employer at its Bloomfield, New Jersey facility, excluding all social workers, dietitians and non-professional employees, including patient care technicians, ward clerks, administrative assistants, equipment technicians, confidential employees, managerial employees, guards and supervisors as defined by the Act, and all other employees.**[27]

Voting Group B

> **All full-time and regular part-time patient care technicians, ward clerks, and equipment technicians employed by the Employer at its Bloomfield, New Jersey facility, excluding all professional employees, including registered nurses, social workers, dietitians, confidential employees, managerial employees, guards and supervisors as defined by the Act, and all other employees.**[28]

The employees in the non-professional Voting Group B will be polled to determine whether or not they wish to be represented by the Petitioner. The employees in Voting Group A will be asked two questions on their ballot:

> 1. Do you desire to be included with the employees in Voting Group B (all full-time and regular part-time patient care technicians, ward clerks and equipment technicians employed by the Employer at its Bloomfield, New Jersey facility) in a single unit for purposes of collective bargaining?
>
> 2. Do you desire to be represented for the purposes of collective bargaining by District 1199-J, National Union of Hospital and Health Care Employees, AFSCME, AFL-CIO.

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[27] There are 9 to 12 potential employees employed in Voting Group A, depending upon the eligibility of per diem RNs.

[28] There are 25 employees employed in Voting Group B.

If a majority of the professionals in Voting Group A vote "yes" to the first question indicating their wish to be included in a unit with non-professional employees, they will be so included. Their vote on the second question will then be counted together with the votes of the non-professional employees. If the professional employees in Voting Group A vote against inclusion, they will not be included with the non-professional employees. Their vote on the second question will then be separately counted to determine whether or not they wish to be represented by the Petitioner.

The unit determination is based, in part then, upon the results of the election among the professional and the other non-professional employees. However, I now make the following finding in regard to the appropriate unit:

If a majority of the professional employees in Voting Group A vote for inclusion in a unit of non-professional employees, the following will constitute the unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> **All full-time and regular part-time registered nurses, including per diem nurses who have worked at least 120 hours in the relevant quarter, patient care technicians, ward clerks and equipment technicians employed by the Employer at its Bloomfield, New Jersey facility, excluding administrative assistants, social workers, dietitians, confidential employees, managerial employees, guards and supervisors as defined by the Act, and all other employees.**

If a majority of the professionals do not vote for inclusion with the non professional employees, the following two groups of employees will constitute separate bargaining units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Voting Group A

All full-time and regular part-time registered nurses, including per diem nurses who have worked at least 120 hours in the relevant quarter, employed by the Employer at its Bloomfield, New Jersey facility, excluding patient care technicians, ward clerks, administrative assistants equipment technicians, social workers, dietitians, confidential employees, managerial employees, guards and supervisors as defined by the Act, and all other employees.

Voting Group B

All full-time and regular part-time patient care technicians, ward clerks and equipment technicians employed by the Employer at its Bloomfield, New Jersey facility, excluding all professional employees including registered nurses, social workers, dietitians, confidential employees, managerial employees, guards and supervisors as defined by the Act, and all other employees.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the voting groups found appropriate at the time and place set forth in the notice of election to issue subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the voting groups who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been

discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **District 1199-J, National Union of Hospital and Health Care Employees, AFSCME, AFL-CIO** and also to determine whether or not the professional employees in Voting Group A desire to be included with the non-professional employees in Voting Group B.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list for the voting groups found appropriate above, containing the full names and addresses of all the eligible voters in each voting group, shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the NLRB Region 22, 20 Washington Place, 5th Floor, Newark, New Jersey 07102, on or before February 7, 2002. No extension of time to file this list shall be granted except in extraordinary

circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by February 14, 2002.

Signed at Newark, New Jersey this 31st day of January 2002.

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Gary T. Kendellen
Regional Director
NLRB Region 22
20 Washington Place, 5th Floor
Newark, New Jersey 07102

177-1650
177-8501-7000
177-8520
177-8540-8000
177-8560-2800
177-8580-8000
324-2000
362-6712
420-7330
530-4825-5000